No. 548

IN THE

Supreme Court of the United States

October Term 1967

SNOHOMISH COUNTY, A Municipal Corporation,
Petitioner

v.

SEATTLE DISPOSAL COMPANY and the TULALIP TRIBES, A Federal Corporation

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

PETITION FOR REHEARING

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To the Honorable Chief Justice and Associate Justices of the United States Supreme Court:

The County of Snohomish, in the State of Washington, the petitioner herein, prays that a rehearing be held on the denial of a writ of certiorari, Mr. Justice Douglas, with whom Mr. Justice White con-

curs, dissenting, decided December 18, 1967, Cause No. 548,

STATEMENT

On November 6, 1967, an order was entered in this case as follows: "The Solicitor General is invited to file briefs in this case expressing the views of the United States." In December of 1967 the Honorable Solicitor General did file a *Memorondum For the United States* in the cause. A *Memorandum in Reply to the Memorandum For the United States* was prepared and submitted to the court, but was not received by the Clerk of the United States Supreme Court until December 18, 1967, the same day as the Order denying the petition for a writ of certiorari was entered.

REASONS FOR GRANTING THIS PETITION FOR REHEARING

The Solicitor General states on page 5 of his memorandum that the question presented is of limited practical importance and that there is no allegation that the operations of the Disposal Company constitutes hazard or inconveniece to non-Indian property in the county. In reply, reference is made to a portion of Snohomish County's Petition for Rehearing submitted to the Supreme Court of the State of Washington in this case, as is set forth in Exhibit "A" herein. The cited portion of the Petition does not reflect that the size of the reservation is well in excess of thirty (30) square miles or that the Atlantic

Richfield Corporation has since proposed to develop an oil refinery immediately adjacent and north of the reservation, with an initial investment of 65 to 85 million dollars and which only makes the immediate development of long range plans for this area more critical. The Boeing site referred to in Exhibit "A" is the assembly plant for the 747 and the probable assembly plant for the proposed SST. It is for these reasons that Snohomish County feels there is great practical importance to this case.

The issue of 25 CFR § 1.4 was responded to in the Memorandum in Reply to the Memorandum for the United States, which is set forth in Exhibit "B" attached hereto, with printing errors corrected.

In addition to the arguments set forth in the dissent of Justice Douglas to the denial of the petition for a writ of certiorari in this case, this case presents fundamentally one issue. Who has the responsibility and power to zone Indian lands?

The policy of Congress is clearly one to transfer jurisdiction to the state.[1] The holding by the state

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[1] "Similarly, the Indians of several States have reached a stage of acculturation and development that makes desirable extension of State civil jurisdiction to the Indian country within their borders. Permitting the State courts to adjudicate civil controversies arising on Indian reservations, and to extend to those reservations the substantive civil laws of the respective States insofar as those laws are of general appli-

court in this case prevents the acceptance of jurisdiction in zoning by the State of Washington even if the Secretary of Interior should make applicable to the lands in question the ordinances and laws regarding zoning in Snohomish County, pursuant to 25 CFR § 1.4(b). The only remaining alternative if relief is not granted in this case is that the Secretary of Interior may adopt the local ordinances and laws in regard to zoning on this reservation, pursuant to 25 CFR § 1.4(b). This is a chimera. The county and state have no jurisdiction to operate such federal zoning programs. Zoning is a dynamic blend of legislative, judicial, quasi-legislative and quasi-judicial activities implemented by a competent, professionally trained staff requiring constant adjustments to all portions of the program. Assuming the required staff, boards, and commissions are provided by the Federal Government so as to allow adoption of local laws, there would be a myriad of problems involving jurisdiction over each parcel of property, coordination, revision of the laws, federal regulations, and ordinances resulting in a confused jurisdictional checkerboard on

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cation to private persons or private property, is deemed desirable.

"After consideration of the proposed legislation, the committee concluded that: any legislation in this area should be on a general basis, making provision for all affected States to come within its terms; . . ." H. Rep. No. 848, 83rd Cong., 1st Sess., p. 6. See also *Quinault Tribe of Indians v. Gallagher*, 368 F.2d 648 (9th Cir. 1966).

the reservation that would in all probability prevent any effective operation.

Believing that in the long run zoning of the lands in question will be beneficial to the Indians involved and that eventually someone will have to squarely face this issue as industrial and urban growth reaches other reservations, we earnestly pray that favorable reconsideration be given to the requested petition for certiorari in this case. Snohomish County sincerely fears that failure to grant this petition will result in a failure of any level of government accepting responsibility for this problem.

Respectfully submitted,

JOHN F. WILSON
Special Deputy Prosecuting Attorney and Counsel for Petitioner

EXHIBIT "A"

I.

THE STAKES INVOLVED

The court should take judicial notice of the following information: The Boeing Company has launched one of the largest industrial projects ever in Snohomish County. The county is one of the fastest, if not the fastest, growing county in the United States. The population may well double (or more) in the next ten or fifteen years. 200,000 to 300,000 new residents

may well reside in Snohomish County in the next ten to fifteen years. The Tulalip Reservation lying just across the river to the north of Everett, bounded on the east by Marysville, on the west by the Puget Sound, and on the north by a relatively undeveloped area, is an extremely valuable piece of real estate, and will participate in this growth and development. Large suburban and urban developments are now knocking on the reservation's south and east doors. The freeway, which will run along the east side of the reservation, is scheduled for completion at the end of 1969, thus giving ten to fifteen minute access to the Boeing site, and thirty to forty minute access to downtown Seattle. At the present time much of the reservation is undeveloped, but this is already starting to change. Once the area is developed, due to the rules regarding existing non-conforming uses, no effective zoning or control of the development of the area is possible until the existing development has outlived its economic life. In other words, if any planning or zoning is to be effective before the year 2025 or 2050, it must be done within the next one, two, three, four or five years, at the very latest.

During oral argument, the respondent stated that the only federal control of land use on the reservation is in regard to sale of land and long term leasing, none other. In effect, there is no federal attempt, even, in regard to the long range planning or zoning or land use of the area. Although Tulalip Tribes, Inc. is a very progressive organization, it only controls a portion of the reservation. It has not made effective

zoning plans, and even if it has, it is impossible to make effective zoning if you only control the black squares of the checkerboard. Spot zoning is in effect no zoning. The county's control of the other squares also can have no real effect.

The states being denied any power in regard to zoning has in reality effectively prevented any long range planning or zoning control of this large and choice piece of property for the next century. This holding will have a direct and substantial effect upon the grandchildren of unborn residents of Snohomish County.

The county submits that with minor revisions in the holding of the court in the instant case, this result can be ameliorated, and at the same time, substantial safeguards can be provided to assure that the tribe, the individual Indians, and the interests of the United States in the property are protected.

In regard to the tracts directly involved in this case, the court can take judicial notice that suitable sites for sanitary land fill are very difficult to find, and if suitable, no zoning agency is likely to deny their use. If properly regulated, the sanitary land fill can be done in such fashion that no air, water, rodent, or aesthetics pollution takes place during operation, and upon completion, the land is far more valuable than it was at the start. This results in land which may be used for commercial, residential, or recreational use. Unregulated garbage dumps result in

each of these types of pollution, and the end result is unusable land. The tracts involved lie athwart the junction of Everett, Marysville, and the prime reservation lands. They lie in the island delta of the Snohomish River, in full view of Highway 99, the projected Interstate 5, and the international railroad mainlines. Reliance upon a nuisance theory of control guarantees that prior to control the river has been polluted, the air blackened, the diseases have spread, or the fires are raging.

Snohomish County contends that these are the stakes involved in this case.

EXHIBIT "B"

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MEMORANDUM IN REPLY TO THE
MEMORANDUM FOR THE UNITED STATES

All parties and the Washington Supreme Court have missed the controlling citation as set forth by the Solicitor General in his Memorandum For the United States, pages 3 and 4, 25 C.F.R. 1.4.

No excuse can be given for the oversight, but it should be noted that the regulation as adopted must have been in light of the instant case before the Court, in light of the last paragraph of the introductory comment of John Carver, Jr., Under Secretary of the Interior, as set forth in 30 Federal Register, page 7520, which states:

> "Accordingly the new § 1.4 is hereby adopted as revised and is set forth below. Because there are immediate cases of conflict between the attempts of State and local governments to enforce zoning ordinances, building codes and similarly regulatory laws on the one hand and the provisions of leases and other agreements under which trust or restricted Indian property is being used on the other, it has been determined to be in the best interests of the Indians and the public to resolve those conflicts as quickly as possible. Therefore, the new section shall become effective on the date of this publication in the Federal Register."

No actual notice was given to the interested parties, although at that time there had been a judgment by the trial court (p. 1-3 of Petition for Writ of Certiorari) and the specific matter was pending before the Supreme Court of the State of Washington.

Section § 1360(b), as set forth on page B-8 of appellant's Petition for Writ of Certiorari and RCW-

37.12.060, as set forth on page B-13 of appellant's Petition for Writ of Certiorari, both state in the pertinent part:

> "*Nothing in this section shall authorize the* alienation, *encumbrance*, or taxation *of any real or personal property*, including water rights, *belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto;* or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein."

The result is that now in the state of Washington there is no method, even with the consent of the Secretary of Interior as set forth in 25 C.F.R. 1.4(b), for the state or any local governmental unit to exercise any zoning powers due to the holding of the Supreme Court of Washington that they are an encumbrance and therefore barred by both federal and state law.

This result will continue in spite of the aims set forth on page 3 of the H. Rep. No. 848, 83d Cong., 1st Sess., as follows:

> "This legislation, whether before the House or presently under committed consideration, has two coordinate aims: First, withdrawal of Federal responsibility for Indian affairs wherever practicable; and second, termination of the subjection

of Indians to Federal laws applicable to Indians as such."

and in spite of the purpose of 25 C.F.R. 1.4, as set forth by the Under Secretary of the Interior in 30 Fed. Reg. 7520, as follows:

> "The purposes of this addition are: (1) to enunciate and particularize in regulatory form for the benefit and guidance of those concerned the sense of existing law under which laws, ordinances, codes, resolutions, rules or other regulations of a State, or its political subdivisions, limiting, zoning or otherwise governing, regulating or controlling the use or development of property are inapplicable to trust or restricted Indian property held or used under a lease or other agreement; and (2) to provide for the adoption and application by the Secretary in specific cases, after consultation with the Indian owner, of all or part of any laws enacted by a State or any of its political subdivisions regulating the use of property, which would otherwise be inapplicable."

Contrary to the assertion of the Honorable Solicitor General Erwin N. Griswold in the Memorandum For the United States, page 5, the holding in the instant case will prevent the Department of Interior from borrowing appropriate restrictions on land use from state law when it is called for, as in all cases in Washington, they will be a prohibited "encumbrance." Since this is the only highest state court ruling, this case will also be persuasive authority to be overcome in the other states which may have the same problem arise; namely, California, Minnesota, Nebraska, Oregon, Wisconsin, Arizona, Montana, New Mexico,

North Dakota, Oklahoma, South Dakota and Utah. See H. Rep. No. 848, 83rd Cong., 1st Sess., p. 6, 7. This case will have a bad precedential effect if not corrected.

The only logical remedy at this time to prevent this situation would be to summarily remand this case back to the Supreme Court of the state of Washington for reconsideration in light of the Memorandum For the United States and 25 C.F.R. 1.4. Assuming without conceding that the issue of whether there is a federal trust or whether the fee is subject to restrictions, is too narrow an issue to warrant review by this Court as set forth in note 2, page 2 of Memorandum For the United States, the controlling issue would be whether there is a retroactive effect to 25 C.F.R. 1.4, as it concededly is controlling if applicable.

Assuming the State of Washington finds 25 C.F.R. 1.4 is controlling and reverses its holding on encumbrance, then application could be made by Snohomish County to the Department of Interior to make the zoning codes at issue applicable to the Tulalip tribal lands and the hiatus which has developed in this case preventing either state or federal control of zoning in Washington would be prevented.

In regard to the statement of the Solicitor General that no allegation is made that the operations of the Seattle Disposal Company constitute a hazard or inconvenience to non-Indian property in the county, the reason is that procedurally, since the case was decided

by a motion for summary judgment proceeding, no opportunity has been presented for presentation of evidence thereon.

Although the issue has not been before any court, nor is it before this Court, the county's position in regard to Tribal Ordinance (Pet. for Writ of Cert., p. 17-25) and the lease to Seattle Disposal Company do not approach the federal government's recommended minimum standards for the operation of sanitary land fills.

Respectfully submitted,

JOHN F. WILSON
Special Deputy as
Counsel for Petitioner

December, 1967

CERTIFICATE PURSUANT TO RULE 58 § 2

I, John F. Wilson, Special Deputy Prosecutor and counsel for petitioner, hereby certifies that the attached petition for rehearing is presented in good faith and not for delay and that the petition is restricted to grounds which are confined to intervening circumstances of substantial or controlling effect or to other substantial grounds available to petitioner, although not previously presented.

JOHN F. WILSON
Special Deputy Prosecutor
and Counsel for Petitioner

Due and timely service of the within brief by